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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re MARIE and CRYSTAL L., Persons
Coming Under the Juvenile Court Law.

B147744
x-ref. B148438

(Super. Ct. No. CK 33634)

LOS ANGELES COUNTY DEPARTMENT
OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

TERESA L.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County.
Debra L. Losnick, Temporary, Judge. (Pursuant to Cal. Const., art. VI, § 21.)
Affirmed.

Torrence L. Howell, under appointment by the Court of Appeal, for Defendant
and Appellant.

Lloyd W. Pellman, County Counsel, Jacklyn K. Louie, Deputy County Counsel,
for Plaintiff and Respondent.

In this appeal, Teresa L., the paternal grandmother to dependent minors Marie L. and Crystal L., appeals from the order denying her motion for de facto parent status. (Cal. Rules of Court, rules 1401(a)(8), 1412(e).)¹ We affirm the order.

BACKGROUND

The following facts are taken from the related appeal (No. B148438) of the minors' parents, Johnny A. and Marie A., in which we affirmed the judgment terminating their parental rights. (Welf. & Inst. Code, § 366.26.)²

Mother, who first gave birth at age 13, had seven children, three younger children by Father (Marie L., Stephanie L., and Crystal L.), and four older children by another. The four older children (Misael Q., Johnny Q., Anthony Q., and Matthew Q.) are under legal guardianship and are not parties to this proceeding.

Both Mother and Father have a history of drug addiction.

Marie was born in January 1997. At the time, Mother and Father were living with paternal grandmother Teresa L.

In April 1998, Mother gave birth to Stephanie L., who was born prematurely at 30 to 32 weeks gestation with cocaine in her system. Mother also tested positive for cocaine.

The Los Angeles County Department of Children and Family Services filed a section 300 petition regarding Marie and Stephanie on April 24, 1998. Marie was detained in Grandmother's home, while Stephanie remained hospitalized in the intensive care unit. Upon Stephanie's release from the hospital, she was also detained in

¹ “‘De facto parent’ means a person who has been found by the court to have assumed, on a day-to-day basis, the role of parent, fulfilling both the child’s physical and psychological needs for care and affection, and who has assumed that role for a substantial period.” (Cal. Rules of Court, rule 1401(a)(8).)

“Upon a sufficient showing the court may recognize the child’s present or previous custodians as de facto parents and grant standing to participate as parties in disposition hearings and any hearing thereafter at which the status of the dependent child is at issue. The de facto parent may: [¶] (1) Be present at the hearing; [¶] (2) Be represented by retained counsel or, at the discretion of the court, by appointed counsel; [¶] (3) Present evidence.” (Cal. Rules of Court, rule 1412(e).)

² All further statutory references are to the Welfare and Institutions Code.

Grandmother's home. It appears that Mother and Father continued living in Grandmother's home during the reunification period, although it also appears one or both lived elsewhere from time to time.

The court sustained the petition at the jurisdictional and dispositional hearings on July 15, 1998. Mother and Father were given reunification services. The reunification plan included individual counseling, parenting education, drug counseling and random drug testing.

By the six-month review hearing on January 13, 1999, the parents had not completed the plan due to having been terminated from drug counseling for poor attendance. Although Marie and Stephanie were under the age of three, the Department recommended, and the court granted, an additional six months of reunification services.³ The court also allowed Mother and Father to continue living with Marie and Stephanie at Grandmother's home.

At the 12-month review hearing in July 1999, the court allowed a 60-day visit in the parents' (Grandmother's) home. During the visit, on August 29, 1999, Stephanie suffered a spiral fracture to the left wrist. The parents told Department social workers that Stephanie had fallen from her crib and the injury was a "hair-line fracture only[.]"

By September 1999, Mother and Father had completed drug counseling and continued to test clean for drugs. The court ordered Marie and Stephanie returned to Mother and Father's custody. The family was given maintenance services. Father and Mother were no longer required to drug test or attend counseling.

In October 1999, Stephanie died under suspicious circumstances. According to Mother, Stephanie had developed a habit of throwing herself backwards onto the (carpeted) floor during tantrums. Mother stated that on the evening before her death, Stephanie had a tantrum before bedtime. Father stated he had found Stephanie

³ Section 361.5, subdivision (a)(2) provides: "For a child who, on the date of initial removal from the physical custody of his or her parent or guardian, was under the age of three years, court-ordered services shall not exceed a period of six months from the date the child entered foster care."

unconscious in her bed at midnight and attempted CPR. After phoning Grandmother, who came to the house,⁴ the parents called the police. Stephanie was taken to the hospital, where she was pronounced dead on arrival. Marie was taken into protective custody, and a police investigation ensued.

On October 25, 1999, the Department filed a supplemental petition (§ 342) for Marie, alleging that Stephanie had died of unexplained causes resulting from the unreasonable or negligent acts or omissions of Mother, Father, and/or Grandmother. On October 26, 1999, the court ordered Marie detained and placed in shelter care. Mother and Father were given monitored visits.

In October 1999, Crystal was born. The Department filed a petition for Crystal on November 2, 1999. (§ 300, subds. (b) [minor at substantial risk of physical harm due to parents' inability or failure to adequately supervise or protect], and (j) [minor at substantial risk of abuse or neglect due to the abuse or neglect of a sibling].) Crystal was ordered detained in foster care on November 3, 1999, and the parents were given monitored visitation.

On January 10, 2000, the Department filed amended section 300 and 342 petitions regarding Crystal and Marie, respectively. In addition to subdivisions (b) and (j) of section 300, the petitions alleged subdivisions (a) [substantial risk of serious future injury inflicted nonaccidentally by the child's parent], (e) [severe physical abuse inflicted upon a child under age five], (f) [parent caused the death of another child through abuse or neglect], and (i) [child subjected to acts of cruelty by a parent or the parent has failed to protect the child from acts of cruelty]. The Department acted partly on the basis of preliminary findings by Dr. Carol D. Berkowitz, executive vice-chair of the Department of Pediatrics of the Harbor-UCLA Medical Center and professor of Clinical Pediatrics at the UCLA School of Medicine. Dr. Berkowitz stated in her letter dated December 30, 1999, that the parents' explanation of Stephanie's death was not consistent with the

⁴ Grandmother moved out of the house after custody was returned to the parents.

evidence. She stated in part: “On or about 10/[]99, Stephanie was found not breathing by her father. It is unclear why her father went to check on her specifically, why she was on the floor and whether this was her usual place to sleep. Although the paternal grandmother suggests that Stephanie was alive when found, the data from law enforcement/paramedics noting severe stiffness suggests that rigor mortis had set in and that she had been dead for a while. At the age of 18 months, she is out of the age range for SIDS. The fall to the carpet could not have caused a lethal head injury.”

The autopsy report, dated January 10, 2000, failed to state a cause of death due to the lack of an eyewitness or confession to confirm the physical signs of possible suffocation.⁵ The autopsy report indicated Stephanie had suffered physical abuse including multiple bruising, pulled hair, possible suffocation, and “three old injuries: [¶] 1. Possible twisting injury to the bone of the right lower leg, [¶] 2. A broken left forearm with twisting injury to the upper arm, [¶] 3. Focal fibrosis and evidence of old bleeding in the mesentery (under the stomach). [¶] Stephanie’s caregivers had previously taken her to the doctor for a ‘sprained ankle’ and a fall from a crib at the age of 14-16 months. Both of these household accidents rarely cause bony injury and must in retrospect be regarded as suspicious. No history to explain the deep abdominal injury has been offered, and none is likely because this is clearly an inflicted injury (due to punch by an adult) in this age group.”

Dr. Berkowitz, upon examining the autopsy report, stated that in her opinion, “the preponderance of medical evidence is that Stephanie had prior inflicted trauma.”

Following an adjudication hearing in April 2000, the juvenile court sustained the petitions as to section 300, subdivisions (a), (b), (i), and (j). The court specifically found Mother, Father, and Grandmother were not credible witnesses due to inconsistencies in their statements. The court found that the parents had not explained Stephanie’s death

⁵ The autopsy report indicated that Stephanie’s lungs showed signs of possible suffocation, “but suffocation cannot be diagnosed at autopsy unless there is a confession or an eyewitness. In addition, to these acute findings, Stephanie’s lung showed evidence of previous bleeding – a finding that has been associated with past episodes of attempted suffocation in some reported cases.”

and prior injuries. The court found that Stephanie was a battered child whose death was not accidental: “[T]he court completely agrees . . . that this certainly looks like a battered-child-syndrome case, and as we all know, it starts with minimal injuries and increases, and . . . results in a child’s death, which is what I think we have here.” The court refused to sustain the petition as to section 300, subdivision (f) [parent caused the death of another child through abuse or neglect], however, due to the court’s uncertainty whether Mother, Father, or Grandmother was the perpetrator: “Going back to [subdivision (f)], it is this court’s belief that I need to have exactly what happened to this child. I need to have a named perpetrator[.] [W]hile I think that someone, either the father, the mother, or the grandmother in fact caused the death of this child, I don’t know exactly what happened to this child, and I do not feel it would be appropriate for me to find [the subdivision (f) allegation] true which necessitates me finding who caused the death of the child.”

The court appointed Dr. Michael Ward as the Evidence Code section 730 evaluator. Dr. Ward, who testified at the August 2000, disposition hearing, stated that the decision to terminate the parents’ contact with the minors depends on who was responsible for Stephanie’s injuries and death. Dr. Ward testified in part that if the parents had caused Stephanie’s injuries and death, “then, of course, their contact should be terminated. . . . If they didn’t, then by definition these children are being kept from parents they should not be kept from. . . . But so the issue is, you know, if we knew what happened and who did it, we wouldn’t be here. That would be solved so you know for sure, but it would be very detrimental for a child not to be with a parent unless there is a very, very good reason not to be with a parent, and there is reason here clearly to be very concerned about it, obviously.”

At the close of the disposition hearing, the court found that reunification services would not be appropriate under sections 361.5, subdivision (b)(6) [services need not be offered where the parent has inflicted severe physical harm on the minor or the minor’s sibling, and the court finds that reunification services would not benefit the minor]. The

court declared Crystal to be a dependent minor and removed custody from the parents. Marie and Crystal were ordered suitably placed. Counseling was ordered for both parents and Grandmother. Permanent placement services were ordered and a section 366.26 hearing was set.

By November 2000, Crystal and Marie were placed with the same foster parents, who wish to adopt them.

Both parents attended many, but not all, of their monitored visits with Crystal and Marie.

At the section 366.26 hearing, the court found credible the damaging testimony of Father's uncle, Hector R., who saw Father shove Mother and pull her hair, and overheard Father and Mother blaming each other for Stephanie's death. According to Hector, Mother said that she had kicked Stephanie in the stomach; Father said that he had hit Stephanie on the head with a closed fist. On December 30, 2000, the day after Hector overheard those statements, Father attacked Hector with a hammer to the head while he was asleep, sending him to the hospital. While Father was hitting Hector, Father said that he was going to kill Hector. Mother, who was present during the attack on Hector, yelled, "Kill him. Kill him." Hector believed he was attacked because he had overheard the parents discussing their roles in Stephanie's death. After the attack, Hector spoke with Grandmother (Hector's half-sister), who told him that Mother and Father had "said that they had killed [Hector]."

On January 10, 2001, Hector went to the Department and reported what the parents had said and done. At the section 366.26 hearing, Dr. Ward testified that if Hector's story was true, "of course, that would change my opinion. It would be extremely negative information, and it would certainly have to make anyone say that this child or any child would be at great risk with these people."

Marie, who was born in January 1997, lived with her parents for almost the first three years of her life until Stephanie's death in October 1999. Crystal, who was born after Stephanie's death, has never lived with her parents. Dr. Ward testified at the section

366.26 hearing that it would “definitely” be better for Marie, who is now almost five years old, to be adopted at age five rather than at age six or seven or older. With regard to adoption, Dr. Ward testified that “if you are going to do it, get on with the process because the earlier the better for developing these relationships.”

At the close of the section 366.26 hearing, the trial court stated in part: “I would also note that Dr. Ward indicated that if . . . the court were to find [Hector’s testimony] true [it] would cause him great concern, and I do find [Hector’s] testimony to be completely credible.” The court found the section 366.26, subdivision (c)(1)(A) exception to be inapplicable: “In this case I have a situation where the parents have only had monitored visits. In addition to . . . only having monitored visits, there has been significant violation of the court’s order during those visits as testified to by the monitor and the grandmother, who were present during the violations of the visits. [¶] The court does not feel that there has been a benefit shown to me that would reach to the level of the exception having been proven.”

The court found by clear and convincing evidence that Marie and Crystal were likely to be adopted and terminated parental rights.

ADDITIONAL FACTS

The court, prior to terminating parental rights, ordered the Department to investigate Grandmother’s home as a possible placement for the minors. Dr. Ward testified that, based on his evaluation of Grandmother, he was concerned about her credibility and history of drug use. Grandmother has, according to Dr. Ward, characteristics of a personality disorder and needs therapy. Dr. Ward stated that therapy “should be[] well[] on its way with her before we actually put the child with her, and we have to make sure that we are getting feedback from people saying ultimately, yes there have been problems, but we can trust her to some significant degree.”

Grandmother received individual counseling for six weeks between August and October 2000. The therapist submitted a report stating that in her opinion, Grandmother

was not a threat to the minors' safety or well-being, and would protect them from the parents' inappropriate behavior. The Department, however, rejected this evaluation, stating it was based on insufficient contact of only one conjoint session with the minors and Grandmother. The Department considered it doubtful, given Grandmother's lack of credibility and Father's dominant personality, that Grandmother would be capable of providing true information to the Department and resisting the parents' efforts to move back into the home once jurisdiction was terminated.

Grandmother filed her motion for de facto parent status on December 5, 2000. She stated: "I took care of them I gave them baths and feed them. I Teresa also took care of them when they were sick and provided for them from 1-10-97 to 10-21-99[.] I Love my Grandchildren with all my heart[.]"

On February 5, 2001, the court rejected Grandmother's motion. The court found that:

"The Court is aware that the grandmother did not have an attorney assist her in filing the de facto parent application. She did appear to file it herself, and though the Court finds that the declaration necessary would be inadequate for the de facto parent motion, I would also like to note that the grandmother was found in the petition to be one of the persons that the Court found to be responsible, if you will, for the death of the child Stephanie.⁶

"Further, the Court feels that the grandmother could not make the showing even if I were to grant a hearing for the de facto parent application in light of the K[ie]sh[i]a E. case, i.e., a wholesome, stable environment would have to be shown when the grandmother had the children or had access, if you will, and as I recall, though the testimony differed, the grandmother saw the children very frequently at the time of Stephanie's death.

⁶ Grandmother was not a named party in the petition.

“The court also wishes to note as I did during the adjudicatory portion of this case that the Court felt and made a finding that the mother, father, and grandmother’s testimony differed so significantly that the Court found all three not to be credible.”

DISCUSSION

With regard to de facto parent status orders, we review the juvenile court’s ruling for an abuse of discretion. (*In re Michael R.* (1998) 67 Cal.App.4th 150, 156.) An abuse of discretion is found where the lower court’s ruling was arbitrary, capricious, or patently absurd. (*In re Mark V.* (1986) 177 Cal.App.3d 754, 759.)

Under *In re Kieshia E.* (1993) 6 Cal.4th 68, a person may forfeit de facto parent status by abusive conduct toward the child. “When a juvenile court has found that the nonparent committed such abuse, and has therefore deemed it necessary to make the victim a dependent of the court, the abuser is barred from intervening in the same proceedings under the de facto parenthood doctrine. The abuser forfeits the opportunity to appear as a party, be represented, and give evidence about disposition in a dependency proceeding caused by the misconduct.” (*Id.* at p. 80.) The same principle applies where the nonparent fails to protect the minor from abuse by a parent by allowing the abusive parent unlimited contact with the minor. (*In re Michael R., supra*, 67 Cal.App.4th at pp. 157-158.)

The Department questioned Grandmother’s ability to report the truth regarding the minors and to protect them from the parents. Although Grandmother received six weeks of counseling, the Department considered this insufficient to draw valid conclusions regarding her ability to protect the minors. Under *Michael R.*, this was sufficient ground to deny de facto parent status.

DISPOSITION

The order denying de facto parent status is affirmed.

NOT TO BE PUBLISHED.

ORTEGA, Acting P.J.

We concur:

VOGEL (Miriam A.), J.

MALLANO, J.